

BEFORE THE GOVERNING BOARD OF THE  
RIVERSIDE UNIFIED SCHOOL DISTRICT  
RIVERSIDE COUNTY, STATE OF CALIFORNIA

In the Matter of the Reduction in Force  
Proceeding Involving:

OAH No. 2012020509

CERTAIN CERTIFICATED EMPLOYEES  
OF THE RIVERSIDE UNIFIED SCHOOL  
DISTRICT WHO RECEIVED  
PRELIMINARY LAYOFF NOTICES FOR  
THE 2012-2013 SCHOOL YEAR,

Respondents.

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Riverside, California, on April 24, 2012.

Melanie A. Petersen and Kerrie Taylor, Atkinson, Fagen, Friedman & Fulfrost, represented the Riverside Unified School District.

Marianne Reinhold, Reich, Adell & Cvitan, represented respondents Erin Aceves, Terrilynn Bresette-Neve, Catherine Breyer, Keren Broderick, Jennifer Cao, Tracie Carroll, Natalie Davis, David Dillon, Melissa Gill, Danielle Ippolito, Laurie Irvin, Joanna Jimenez, Kevin LeDuc, Brandi Marsh, Kristina McCann, Kristi McCormack, Justin Partridge, Randi Potwardski, Christina Ramirez, Sylwia Rusilowicz, Shiva Salehpour, Teri Stamen, Alicia Vannatter, Sandra Villasenor, and Nathan Walker.

Respondent Cheston Booth represented himself.

The matter was submitted on April 24, 2012.

FACTUAL FINDINGS

*The Riverside Unified School District*

1. The Riverside Unified School District serves approximately 42,200 Kindergarten through 12<sup>th</sup> grade students who reside in the City of Riverside and the

unincorporated areas of Highgrove and Woodcrest. The District employs approximately 3,700 persons, 2,026 of whom are certificated employees. The District operates and maintains 30 elementary schools, seven middle schools, five comprehensive high schools, a continuation high school and one alternative school which includes a virtual school.

The District has a projected budget of approximately \$296 million in revenues and \$329 in expenditures for the 2012-2013 school year, resulting in a \$33 million shortfall. About 85 percent of the District's budget pays for employee salaries and benefits.

2. The District is governed by an elected five-member Board of Education. Rick Miller, Ph.D., is the District Superintendent and Chief Executive Officer. Susan Mills is the Assistant Superintendent, Human Resources. Lou Mason is the Director of Certificated Personnel and Human Resources.

### *The Fiscal Crisis*

3. Public schools rely on financing from the State of California. A school district cannot determine the level of state funding it will receive until the state budget is chaptered, an event that is supposed to occur each year in late June. Before then, a school district's governing board, which has the duty to produce and file a balanced budget with the County Department of Education, must take steps to ensure that financial ends meet if the worst-case financial scenario develops.

California's recent economic problems have had a crippling impact on the Riverside Unified School District and other public school districts. If the District cannot meet its financial obligations, County Office of Education has the authority to intervene and take over the District's operations.

### *The District's Response*

4. In response to the anticipated budgetary shortfall for the 2012-2013 school year, District administrators reviewed services and staffing. The District embarked upon a program to trim its budget. The district decided to reduce expenditures for instructional materials, to decrease classified staff, and to reduce or eliminate particular kinds of services provided by credentialed employees.

5. In early February 2012, in preparation for a recommendation that particular kinds of services be reduced or eliminated, the Board adopted criteria relating to the retention of certificated employees possessing special training or experience in order to retain employees possessing a Bilingual Cross-Cultural Language and Academic Development Certificate (BCLAD). The skipping of elementary school teachers holding BCLAD certification is discussed in greater detail in Factual Finding 11A.

6. On March 5, 2012, following a thorough review of the District's budgetary situation and financial projections for the 2012-2013 school year, District staff recommended

to the Board that the Board adopt Resolution No. 2011/2012-42. After deliberation, the Board adopted that resolution, which provides:

WHEREAS, on February 29, 2012, the Governing Board of the Riverside Unified School District (District) adopted budget mitigation measures which, in part, provide the basis for the reduction or discontinuance in particular kinds of services; and

WHEREAS, on February 6, 2012, pursuant to the provisions of California Education Code Section 44955(b), the Governing Board of the District adopted criteria to determine the seniority rank order for employees whose seniority began on the same day (commonly known as "tie-breaking criteria"). Such criteria are required to differentiate between employees based on an objective expression of the District's needs should it become necessary to determine the order of termination for employees who first rendered paid service as a certificated probationary employee to the District on the same day; and

WHEREAS, on February 6, 2012, pursuant to the provisions of California Education Code Section 44955(d), the Governing Board of the District adopted criteria to retain certificated employees who possess special training or experience (commonly referred to as skipping criteria). Such criteria are required to retain certificated employees who possess special training or experience, which other certificated employees with more seniority do not possess, to teach a specific course of study; and

NOW THEREFORE, BE IT RESOLVED that pursuant to Education Code Sections 44955 and 44949 that the Governing Board of the District has determined:

1. That it shall be necessary to reduce or discontinue the particular kinds of services of the District as itemized in Exhibit "A", attached hereto, at the close of the current school year.
2. That it shall be necessary to terminate at the end of the 2011-12 school year, the employment of certain certificated employees of the District as a result of this reduction or discontinuance in particular kinds of services.
3. The Superintendent is directed to send appropriate notices to all employees whose services shall be terminated by virtue of this action. Nothing herein shall be deemed to confer

any status or rights upon temporary or categorically funded project certificated employees in addition to those specifically granted to them by statute.

PASSED AND ADOPTED by the Board of Education this 5th day of March, 2012 . . . .

Exhibit A to Resolution No. 2011/2012-42 provides:

### **EXHIBIT A**

<u>Services</u>		<u>Number of Full Time Equivalent Positions</u>
1.	Elementary Teachers	45.4
2.	Secondary Teachers:	
	Life Science	1.0
	PE	2.0
	Social Science	2.0
	Health	1.2
	Spanish	1.6
	French	0.6
	English	16.0
	Math	3.0
	Special Education (Mild-Moderate)	0.8
3.	Counselors	6.2
<b>Total Full Time Equivalent Reduction</b>		<b>79.8</b>

#### *The Particular Kinds of Services*

7. The services identified in Exhibit A were the kinds of services that could be reduced lawfully under the Education Code. The Governing Board's enactment of Resolution No. 2011/2012-42 was neither arbitrary nor capricious; its enactment was well within the Governing Board's discretion; no particular kind of service was lowered to a level below that mandated by state or federal law; the enactment of Resolution No. 2011/2012-42 related solely to the economic crisis and the Governing Board's duty to balance the budget.

### *The District's Seniority List*

8. The District maintains a seniority list, an evolving document that is updated as new certificated employees are hired and as other employees retire, resign, or otherwise become separated from service. The seniority list is a spreadsheet that is organized from the District's most senior certificated employee to the most recently hired certificated employee. The list contains each employee's seniority date, the site where the employee most recently provided services, the employee's name, assignment, status (tenured, probationary, or otherwise), the employee's English Language (EL) certification, the kind(s) of credential(s) the employee holds, the kind(s) of academic degree(s) the employee holds, and a column in which tie-breaking criteria are tabulated.<sup>1</sup>

In December 2011, when it became apparent that a reduction in force might become necessary, the District forwarded the seniority list to all school sites and directed site supervisors to distribute the list to certificated employees for review and, if necessary, correction. Three days were set aside to enable certificated employees to meet with administrative staff to discuss any concerns. In February 2012, letters concerning the accuracy of the seniority list were sent to all certificated employees whose employment status was believed to be at risk as a result of this reduction in force proceeding, with the request that each employee review the list and verify or update his or her seniority information; if an employee did not contact District administrative staff and provide updated information in a timely manner, the staff concluded that the information set forth in the seniority list was correct.

### *The Issuance of Preliminary Layoff Notices*

9. Using the updated seniority list, Resolution No. 2011/2012-42, the tie-breaking criteria, and considering positive attrition, the administrative staff identified those certificated employees who should receive preliminary layoff notices and those who should not. Whenever an employee whose particular kind of service was being eliminated by Resolution No. 2011/2012-42 and who was identified as being in line to receive a preliminary layoff notice, that employee's seniority and credentials were carefully examined

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<sup>1</sup> The Board established criteria to determine the seniority rank order for employees having the same seniority date under Education Code section 44955, subdivision (b). Under the Board's criteria, two points are awarded for a Math, Science or Special Education credential; three points are awarded for holding a BCLAD if it is required for the current assignment; two points are awarded for holding a BCLAD if it is not required for the current assignment; one point is awarded for holding a CLAD or equivalent authorization; one point is awarded for each additional bachelor's degree an employee holds after the first bachelor's degree; one point is awarded for each master's degree; one point is awarded for each doctorate; one point is awarded for each preliminary credential the employee holds; and two points are awarded for each clear or life credential the employee holds. Total points were added and that figure was placed in the far right column of the seniority list.

to determine if he or she had the seniority, credentials, and competence to “bump” a junior employee and assume the more junior employee’s position.

Preliminary layoff notices were issued to the certificated employees whose employment the District staff determined was subject to reduction or elimination as a result of the enactment of Resolution No. 2011/2012-42. The employees, who are respondents in this proceeding, included: Erin Aceves; Patricia Ascencio; Cheston Booth; Vanessa Bowley; Terrilynn Bresette-Neve; Catherine Breyer; Keren Broderick; Gregory Cabrera; Jennifer Cao; Tracie Carroll; Natalie Davis; David Dillon; Jennifer Foster; Alicia Garcia; Melissa Gill; Amanda Hobbs; Danielle Ippolito; Laurie Irvin; Joanna Jimenez; Kevin LeDuc; Brandi Marsh; Jayme McCabe; Kristina McCann; Kristi McCormack; Lisamarie Orosco; Justin Partridge; Elisabeth Perales; Randi Potwardski; Christina Ramirez; Jennifer Riddle; Sylwia Rusilowicz; Shiva Salehpour; Stefanie Santana; Teri Stamen; Marisol Stokes; Brenda Valdez; Alicia Vannatter; Susan Vara-Flores; Vanessa Vasquez-Gonzalez; Sandra Villaseñor; Nathan Walker.

### *The Administrative Hearing*

10. On April 24, 2012, the record in the reduction in force proceeding was opened.

The District rescinded and withdrew the preliminarily layoff notices served on respondents Stefanie Santana and Vanessa Bowley. There was no objection to the District doing so.

Jurisdictional documents were introduced; the caption was amended; opening comments were given by an attorney for the District; a stipulation concerning jurisdictional matters and several exhibits was received; sworn testimony was taken; documentary evidence was received; Director Mason testified about the budgetary crisis, the impact of that crisis on the District’s operations, the layoff process, the seniority list, and the District’s determination to retain the services of certain highly qualified employees. David Haglund, the Director of Educational Options Center (EOC), testified about the need to retain the services of five junior teachers who provide services in the Riverside Virtual School. Alicia Garcia, David Dillon, Cheston Booth, and Justin Partridge testified about their particular situations and concerns. Following the taking of evidence, closing comments were given; the record was closed; and the matter was submitted.

11. Skipping:

A. BCLAD/Dual Immersion: Director Mason testified that the District has a need to retain elementary school teachers who hold BCLAD certification for its dual immersion program. The District intends that all elementary school teachers who hold a BCLAD certification will be required use that certification in the 2012-2013 school year.<sup>2</sup>

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<sup>2</sup> Teachers holding a BCLAD Certificate are authorized to provide services to English Learners in Instruction for English language development (ELD), meaning instruction

The Board's resolution did not refer specifically to skipping elementary school teachers with BCAD certification, but the Education Code does not require that skipping be contained in a Board resolution in order to be effective.

B. EOC/Virtual School: Dave Haglund is the Director of Educational Options Center (EOC), a District campus which currently provides alternatives to traditional educational programs at several schools on EOC's campus (Opportunity, Raincross, and Summit View) as well as the Riverside Virtual School.

The Riverside Virtual School began operations in the 2005-2006 school year, providing on-line educational services to students enrolled in the 3<sup>rd</sup> through 12<sup>th</sup> grades. There are nine teachers assigned to the Riverside Virtual School who provide services there and elsewhere on the EOC campus, and 12 teachers who are not on the EOC campus who provide part-time services at the Riverside Virtual School. Educational services are provided to 175 full-time students and to 650 part-time students who attend the Riverside Virtual School.

Younger students attending the Riverside Virtual School experience a blend of traditional book/paper learning activities and on-line activities. The Riverside Virtual School provides support to the parents involved in the home schooling of students attending the school. The elementary school and middle school curriculum are unique and have been developed by credentialed employees providing services at EOC. The curriculum is "not out of a can."

The Riverside Virtual School maintains a public high school that was the first virtual school accredited by WASC and by the University of California. The high school offers interactive online classes for students within the District and to students who attend high

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designed specifically for EL students to develop their listening, speaking, reading, and writing skills in English, also known as English as a Second Language (ESL) or Teaching English to Speakers of Other Languages (TESOL); in Specially Designed Academic Instruction Delivered in English (SDAIE), meaning instruction in a subject area, delivered in English, that is specially designed to provide EL students with access to the curriculum; and in Content Instruction Delivered in the Primary Language means instruction for EL students in a subject area delivered in the students' primary language. Passing rigorous testing is required to hold BCLAD certification.

The District has a dual immersion program that integrates language minority students (English Learners) and language majority students (English Speakers) in a classroom to develop bilingualism and biliteracy in English and another language. Under state law, parents of English Learners must sign yearly waivers of consent prior to placement of their child in a two-way immersion program. Additionally, before enrollment in the program, California requires English Learners (under ten years of age) to be placed in an English language classroom for 30 calendar days before placement. Teachers providing educational services in the dual immersion program must hold a BCLAD certification.

schools located elsewhere in Southern California through partnership agreements between the District and the home district of those students. The high school curriculum has been developed by credentialed employees providing services at EOC. Director Haglund established that accreditation requires that EOC instructors must possess a teaching credential in the academic area in which instruction is provided.

Director Haglund established that Wes Kreisel, Justin Partridge, Nathan Walker, Jerome Hill, and David Dillon are employed at EOC, that each employee provides services at EOC and the Riverside Virtual School; that each employee has played a major role in the development of curriculum and the delivery of educational services at the Riverside Virtual School as a result of his employment; that each employee has specialized training through the Leading Edge and 3D Game training; and that EOC and the Riverside Virtual School's failure to retain each of these credentialed employees would have a devastating effect on the development of programs and the delivery of instruction.

The Board's resolution did not refer to skipping EOC teachers who provide services at the Riverside Virtual School, but the Education Code does not require that skipping be contained in a Board resolution in order to be effective.

12. Alicia Garcia testified. Ms. Garcia holds a clear multiple subject teaching credential. Her first day of paid employment with the District in a probationary position – her seniority date – occurred on August 22, 2007. She is a tenured employee who received a preliminary layoff notice.

In 2008, Ms. Garcia received a master's degree in Education and Instructional Technology from National University. In order to obtain that degree, Ms. Garcia completed required coursework, developed on-line curriculum, and practiced teaching on-line courses to 2<sup>nd</sup> and 4<sup>th</sup> grade elementary school students.

Ms. Garcia has more seniority than Jerome Hill, who teaches at the Riverside Virtual School at EOC. Ms. Garcia's credential enables her to teach the subjects that Mr. Hill teaches. She also could teach 12<sup>th</sup> grade Language Arts if she held Board authorization. Ms. Garcia would happily complete training the Leading Edge and 3d Game training to retain her employment. Ms. Garcia would like to teach on-line courses and she believes that she has been trained to do so. She has developed on-line curriculum and provided actual on-line elementary school instruction to 2<sup>nd</sup> and 4<sup>th</sup> grade students to obtain her master's degree.

Ms. Garcia is an enthusiastic, highly motivated, credentialed employee. Her testimony was provided in a credible manner. Ms. Garcia did not apply for employment at EOC in 2009 when applications to work at that site were circulated. Ms. Garcia has not taught actual on-line courses and she has not been employed at the Riverside Virtual School.

Ms. Garcia seeks to "bump" into the position Mr. Hill would hold if he were skipped. Unfortunately, Ms. Garcia does not possess the special training and experience necessary to teach at the Riverside Virtual School, and she cannot bump into Mr. Hill's position.



13. The Rescission of Five Preliminary Layoff Notices:

During the reduction in force proceeding, the District rescinded and withdrew the preliminary layoff notices previously issued to Wes Kreisel, Justin Partridge, Nathan Walker, Jerome Hill, and David Dillon. The District's decision in this regard was not arbitrary, capricious, or in bad faith. For each employee, the District, through Director Haglund's credible testimony, demonstrated that the District has a specific need for each employee to teach a specific course or course of study at EOC and the Riverside Virtual School, and that each employee possesses special training and experience necessary to teach that course or course of study which no other credentialed employees with more seniority, including Ms. Garcia, possesses.

The District's decision to rescind and withdraw the preliminary layoff notices previously served on Wes Kreisel, Justin Partridge, Nathan Walker, Jerome Hill, and David Dillon is sustained and upheld.

14. David Dillon's Tenured Status: According to the District's current seniority list, David Dillon possesses a seniority date of February 2, 2007, which is the date he began providing staff development services under a five year grant. Mr. Dillon later became employed as a temporary employee under a temporary contract in the 2009-2010 school year.

Mr. Dillon contends that he is a tenured employee, and that he should not be listed as a probationary employee on the seniority list, and that his seniority date should relate back to the date on which he began service under the five year grant in February 2007.

Attorneys for the District believed that Mr. Dillon probably was a tenured employee, but that his first date of paid probationary service arose out of service under his temporary employment contract, not service provided under the five year grant, and that Mr. Dillon became tenured in November 2012.

Mr. Dillon's tenured status and his seniority date is not relevant to the disposition of this proceeding in light of the District's rescission and withdrawal of the preliminary layoff notice previously served upon him, and the sustaining of the District's action in that regard. However, Mr. Dillon raised the issue of his seniority date in this reduction in force proceeding, thereby preserving the issue for determination.

The evidence concerning Mr. Dillon having acquired tenured status was compelling, but the evidence concerning his exact seniority date was inconclusive. To resolve this issue, it is recommended that the District and Mr. Dillon meet and confer to establish his precise seniority date. If an agreement cannot be reached, then Mr. Dillon shall have the right to raise the issue of his precise seniority date at any reduction in force proceeding held in the future. It is not necessary to resolve the issue in this proceeding because Mr. Dillon will not receive a final layoff notice.

15. Cheston Booth's Seniority Date: Notice is taken of the Commission on Teacher Credentialing website, which represents that Mr. Booth obtained a preliminary single subject teaching credential in Social Sciences on July 15, 2008.

Beginning in 2008, Mr. Booth provided substitute teaching services for the District, primarily on a daily basis although some of his substitute teaching assignments lasted much longer. Mr. Booth made a very favorable impression on administrators within the District, including Director Haglund and Assistant Superintendent Mills. Mr. Booth did not, however, provide substitute teaching services in one classroom for a sufficiently long enough period of time to enable him to attain first year probationary status.

Mr. Booth's first paid day of employment in a probationary capacity occurred on August 25, 2011. Because of his familiarity with the District's operations and his previous substitute teaching experience, Mr. Booth was not required to attend a mandatory orientation for newly hired employees who had no experience with the District, an orientation for which the new teachers were paid. In fact, Mr. Booth was not aware of that mandatory orientation; if Mr. Booth had known about the orientation, had known that he would have been paid for attending it, and had he known that attending the orientation would have affected his seniority date, Mr. Booth gladly would have attended it.

Mr. Booth noted that Nicole Scribner holds a single subject teaching credential in Social Sciences and that she has a seniority date of August 24, 2011, which is one day before Mr. Booth's seniority date. Unlike Mr. Booth, Ms. Scribner had absolutely no experience teaching with the District before she was hired, so she was required to attend a mandatory orientation on August 24, 2011. In doing so, and because Ms. Scribner was paid for attending that mandatory training, the District assigned an earlier seniority date for Ms. Scribner than Mr. Booth's seniority date. Even so, Ms. Scribner's employment for the 2012-2013 school year is subject to termination as a result of this reduction in force proceeding.

Mr. Booth argued that he should hold a seniority date before Ms. Scribner's by reason of his substitute teaching experience, and that it was unjust, unfair, and inequitable for the District to assign to him a more recent seniority date than that assigned to Ms. Scribner. Mr. Booth was unable to state, however, the seniority date the District should have assigned to him. He conceded that he did not serve 75 percent of the school days during one school year in a single substitute position to enable him to attain probationary status under the Education Code, although he was a substitute teacher in several classes for 75 percent of a school year before he was hired as a probationary employee.

Unfortunately, the Education Code does not provide a remedy for persons in Mr. Booth's situation. Instead, Education Code section 44845 provides that a person is deemed to have been employed on the date upon which they first rendered paid service in a probationary position.

16. Justin Partridge's Status: Mr. Partridge's first paid date of probationary service was August 18, 2010. Mr. Partridge holds a preliminary single subject teaching credential

in Science: Biological Sciences (Examination); Foundational-Level General Science (Examination); Science: Geosciences (Examination); and Foundational-Level Mathematics (Examination). This credential authorizes Mr. Partridge to teach the subject areas listed in grades twelve and below, including preschool, and in classes organized primarily for adults.

Mr. Partridge is one of the five teachers employed at the Riverside Virtual School that the District proposed to skip; in this reduction in force proceeding, the District rescinded and withdrew the preliminary layoff notice that was served on Mr. Partridge. Thus, Mr. Partridge's employment is not subject to termination in this reduction in force proceeding.

Mr. Partridge observed that another credentialed employee – Lisa Douglas – holds the same seniority date and possesses a foundational level math credential, but has fewer tie-breaking points than Mr. Partridge. Ms. Douglas was not served with a preliminary layoff notice. Mr. Partridge pointed out that he was authorized to teach the classes Ms. Douglas was teaching and that the District should not have served him with a preliminary layoff notice because he could have bumped into Ms. Douglas's position, which was not subject to the reduction in force proceeding.

Mr. Partridge observed that another credentialed employee – Tony Tadros – has a November 18, 2010, seniority date, which is after Mr. Partridge's seniority date, and that Mr. Tadros also possesses a foundational level math credential. Mr. Tadros was not served with a preliminary layoff notice. Mr. Partridge pointed out that he was authorized to teach the classes Mr. Tadros was teaching and that the District should not have served him with a preliminary layoff notice because he could have bumped into Mr. Tadros's position, which was not subject to the reduction in force proceeding.

Mr. Partridge's observations were acute, but of no moment since his employment cannot not be eliminated in this reduction in force proceeding because the District has rescinded and withdrawn the preliminary layoff notice previously served on him. Mr. Partridge suffered no prejudice.

However, Mr. Partridge raised the issue of his position on the seniority list in relation to Ms. Douglas in this reduction in force proceeding, thereby preserving the issue for determination.

The evidence concerning Mr. Partridge holding more status was compelling. To resolve this issue, it is recommended that the District and Mr. Partridge meet and confer to establish his seniority status as it relates to Ms. Douglas. Ms. Douglas should be entitled to notice of and the opportunity to attend that conference. If an agreement cannot be reached, then Mr. Partridge shall have the right to raise the issue of his placement on the seniority list as it relates to Ms. Douglas at any reduction in force proceeding held in the future. It is not necessary to resolve the issue in this proceeding because Mr. Partridge will not receive a final layoff notice.

### *The Reduction in Force Proceeding*

17. The enactment of Resolution No. 2011/2012-42 was the result of a budgetary crisis; it was enacted in good faith; enacting the resolution was in the best interest of the District and its students. The District complied with all jurisdictional requirements. The District used seniority, credentials, and competence as the basis for “bumping” and retaining the services of senior, competent, and appropriately credentialed employees to provide services that are being provided by more junior employees. The tie-breaking criteria were reasonable and were applied in an evenhanded manner. The District demonstrated good cause to support the skipping of elementary school teachers holding BCLAD certifications and the five EOC employees who provided services at the Riverside Virtual School. The enactment of Resolution No. 2011/2012-42 does not require that the dispute over Mr. Dillon’s tenured status or seniority date be resolved since Mr. Dillon’s services will be retained. The enactment of Resolution No. 2011/2012-42 does not require that Mr. Partridge’s position on the seniority list as it relates to Ms. Douglas be resolved since Mr. Partridge’s services will be retained. Ms. Garcia is not entitled to occupy the position at the Riverside Virtual School that Mr. Hill will retain. Mr. Booth did not establish that he held any seniority date other than August 25, 2011.

### LEGAL CONCLUSIONS

#### *Statutory Authority - Reduction in Force Proceedings*

1. Education Code section 44949 provides in part:
  - (a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor.  
  
[¶] . . . [¶]
  - (b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing . . .

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds . . .

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage

prepaid and addressed to the last known address of the employee. . . .

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

2. Education Code section 44955 provides in part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified . . . and no probationary employee shall be deprived of his or her position for cause other than as specified . . .

(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render . . .

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for

determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject which he or she has not previously taught, and for which he or she does not have a teaching credential or which is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject.

(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

### *Jurisdiction*

3. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in those sections were satisfied as to all respondents.

### *The Reduction of Particular Kinds of Services*

4. A school board may determine whether a particular kind of service should be reduced or discontinued, and it cannot be concluded that the governing board acted unfairly or improperly simply because it made a decision it was empowered to make. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.) A school board's decision to reduce or discontinue a particular kind of service need not be tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as the school district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.)

### *Competence*

5. The Education Code leaves to a school board's discretion the determination of whether an employee must also be competent to be employed in a vacant position in addition to possessing seniority. The term "competent" relates to an individual's specific skills or qualifications, including academic background, training, credentials, and experience, but it does not include evidence related to on-the-job performance. (*Forker v. Board of Trustees* (1984) 160 Cal.App.3d 13, 18-19.)

### *Seniority, Bumping, Skipping*

6. Seniority: Under Education Code section 44845, seniority is determined by the date a certificated employee "first rendered paid service in a probationary position."

7. Education Code section 44846 provides in part: "The governing board shall have power and it shall be its duty to correct any errors discovered from time to time in its records showing the order of employment."

8. The Statutory Scheme: Education Code section 44955, the economic layoff statute, provides in subdivision (b), in part:

Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while . . . any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.



Essentially this statutory language provides “bumping” rights for senior certificated and competent employees, and “skipping” authority to retain junior employees who are certificated and competent to render services which more senior employees are not.

9. **Bumping:** The district has an obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possesses the seniority and qualifications which would entitle him/her to be assigned to another position. (*Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 136-137.)

10. **Skipping:** Subdivision (d)(1) of section 44955 provides an exception to subdivision (b) where a district demonstrates specific need for personnel to teach a specific course of study and that a junior certificated employee has special training and experience necessary to teach that course that the senior certificated employee does not possess. (*Bledsoe v. Biggs Unified School Dist.*, *supra*, at pp. 134-135.) There is nothing in the statute that requires such special needs be evidenced by formal, written policies, course or job descriptions, or program requirements. (*Id.*, at p. 138.)

School districts have broad discretion in defining positions within the district and establishing requirements for employment. This discretion encompasses determining the training and experience necessary for particular positions. Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district. (*Hildebrandt v. St. Helena Unified School Dist.* (2009) 172 Cal.App.4th 334, 343.)

It is significant that the statute and decisional law provide a district with this authority, and do not mention specifically a district’s governing board.

#### *Credit for Temporary or Substitute Services*

11. Education Code section 44918 provides in part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

[¶] . . . [¶]

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace

absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section . . .

12. Section 44918 does not make reemployment rights dependent upon one's formal classification as a "day-to-day" or "long-term" substitute. The statute states only two classifications, "temporary" employees and "substitute" employees. Employees classified as "substitute" are excluded from statutory reemployment benefits if they "are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis." The issue is not whether an individual was formally classified as "day-to-day" or "long-term," but whether that individual was employed to serve in an on-call status to replace absent regular employees on a day-to-day basis. (*Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal.App.3d 469, 473.) Further, tacking is restricted by statute to situations in which the individual serving in a substitute or temporary capacity is "employed as a probationary employee for the following school year."

13. With regard to his service as a substitute teacher, Mr. Booth failed to establish that he served 75 percent of the number of days the regular schools of the District were maintained in that school year and that he performed the duties normally required of a certificated employee District over that period of time and that he was employed by the District as a probationary employee the following school year.

Mr. Booth's seniority date was determined in accordance with the provisions of the Education Code.

#### *Cause Exists to Give Notice to Certain Employees*

14. As a result of the Governing Board's lawful reduction of particular kinds of service, cause exists under the Education Code to authorize the District to give final notice to those respondents who are identified hereafter that their employment will be terminated at the close of the current school year and that their services will not be needed by the District for the 2012-2013 school year.

#### *Determination*

15. The charges set forth in the Accusation were sustained by a preponderance of the evidence except as otherwise stated herein. Good cause supported the skipping of certain certificated employees. The rescission and withdrawal of the preliminary layoff notices serviced on certain employees was appropriate, based upon objective standards, in the best interest of the District and the students thereof, and was done in good faith. The Board's adoption of Resolution No. 2011/2012-42 was related to the welfare of the District and its pupils. The District made necessary assignments and reassignments in such a manner that the most senior credentialed employees were retained to render services that their seniority and qualifications entitled them to provide.

## RECOMMENDATION

It is recommended that the Governing Board of the Riverside Unified School District issue final layoff notices to the following certificated employees: Erin Aceves; Patricia Ascencio; Cheston Booth; Terrilynn Bresette-Neve; Catherine Breyer; Keren Broderick; Gregory Cabrera; Jennifer Cao; Tracie Carroll; Natalie Davis; Jennifer Foster; Alicia Garcia; Melissa Gill; Amanda Hobbs; Danielle Ippolito; Laurie Irvin; Joanna Jimenez; Kevin LeDuc; Brandi Marsh; Jayme McCabe; Kristina McCann; Kristi McCormack; Lisamarie Orosco; Elisabeth Perales; Randi Potwardski; Christina Ramirez; Jennifer Riddle; Sylwia Rusilowicz; Shiva Salehpour; Teri Stamen; Marisol Stokes; Brenda Valdez; Alicia Vannatter; Susan Vara-Flores; Vanessa Vasquez-Gonzalez; Sandra Villasenor

Dated: April 26, 2012

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JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings